Filed 5/10/02

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re the Marriage of SUSAN and GARY LAMUSGA.	
SUSAN POSTON NAVARRO, **Appellant,** **v.** **GARY LAMUSGA,** **Respondent.**	**A096012** **(Contra Costa County Super. Ct. No. D95-01136)**

Susan Poston Navarro (Mother) appeals a postjudgment order transferring custody of the two sons from her marriage to Gary LaMusga (Father) if she moves to Ohio. She contends the court erroneously denied her, as the custodial parent, the presumptive right to move with the children and that its findings do not support the order.

BACKGROUND

The parties married in October 1988. Their older son, Garrett, was born May 5, 1992 and their younger son, Devlen, was born May 5, 1994. Mother commenced dissolution proceedings in May 1996 and requested sole physical custody of the children. Father requested joint physical custody. In July 1996, the parties stipulated to a custody evaluation by psychologist Philip Stahl. Dr. Stahl's October 1996 evaluation reported that Mother wanted to move with the children to Ohio, where she is from originally and

where her sister lives. Father opposed the move because he believed the environment in Ohio was hostile to him and that he would have no relationship with the children if they moved there.

Discussing the proposed move to Ohio, Dr. Stahl opined that the attachment between the children and Father was strong, but the children were not yet old enough to maintain this attachment if they were away from him over long distance and for long periods of time. If they were older, he opined, they would be able to manage the potential insecurity of frequent travel better and could use the telephone and fax machine to offset some of the loss, but a move would be difficult for them at their present age, given their developmental needs. Dr. Stahl further opined that it was important to establish a greater attachment between the children and Father and to stabilize that relationship prior to any move. It was also important for the children to have a reduction in parental conflict, if possible, and to develop a pattern of frequent and continuing contact with Father before a move took place.

In December 1996, the parties were granted joint legal custody. Mother was granted primary physical custody, with reasonable visitation to Father.

The parties' marriage was dissolved as to status only on December 31, 1997.

Mother remarried in September 1998.

In November 1998, Father sought a modification to expand his visitation schedule. In December 1998, the court ordered the 1996 visitation schedule to remain in effect except for a modification of the 1998 Christmas holiday visitation schedule and continued the matter for further hearing. In April 1999, the parties stipulated to having Dr. Stahl update his custody evaluation for purposes of recommending, inter alia, whether any change in "the custody timeshare" was appropriate.

In September 1999, Mother and her new husband had a daughter.

Some time prior to February 2001 Father remarried.

On February 13, 2001, before Dr. Stahl submitted his updated evaluation, Mother sought an order modifying visitation and permitting her to move with the children to Ohio. She sought the order because, in addition to having family there, her new husband

had accepted a "more lucrative management" position with an Ohio business. Her supporting declaration stated that she informed Dr. Stahl of her new husband's job offer and her wish to move to Ohio with the children.

On February 26, 2001, Dr. Stahl submitted his custody evaluation to the court.[1] He opined that the children were "split" in their feelings toward the parties, regarding Mother positively and Father negatively. He recommended a schedule in which the children would spend longer blocks of time with Father. He did not recommend that Mother cease being the "primary parent." However, he suggested that if she continued to denigrate Father and reinforce the children's divided feelings, it might be appropriate to modify custody to a true joint arrangement or to transfer primary custody to Father. The evaluation did not address Mother's proposed move to Ohio because the issue was beyond the scope of the evaluation Dr. Stahl had been asked to make.

Father filed his opposition to Mother's move-away request after Dr. Stahl had submitted his evaluation. He argued that Mother had engaged in conduct leading to the children's alienation from him, that it was in the children's best interest to have regular and uninterrupted visitation with him, and that a move out of state would frustrate such visitation and markedly increase the potential for further alienation. He also argued that if Mother moved, the current custody arrangement should be modified to provide primary physical custody to him because it would promote the children's best interest and shield them from further harm of alienation and polarization.

In March 2001, the court ordered Dr. Stahl to conduct a focused evaluation on the issue of whether the relocation of the children to Ohio was in their best interest. It also adopted the schedule expanding Father's weekly and 2001 spring vacation visitation recommended by Dr. Stahl in his February 26 evaluation, as an interim visitation order.

In May 2001, the court ordered Father to have "custodial time" with the children for alternating two-week periods during their 2001 summer vacation, as recommended by Dr. Stahl in his February 26 evaluation.

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[1] The record does not disclose why the updated custody evaluation was not submitted until 22 months after the parties' stipulation thereto.

In June 2001, Dr. Stahl submitted his "focused" report to the court. He concluded there were "no good choices" in the move-away matter. He observed that (1) Father's relationship with the children could be hurt if they moved with Mother and Mother did not support the Father/child relationship; (2) Mother's family could be fractured if she remained in California with her children and her new husband was in Ohio; (3) if Mother moved to Ohio and primary care was changed to Father, the children would be moved from the primary home they have known. He offered three visitation recommendations, depending on whether (1) Mother was permitted to move to Ohio with the children, (2) Mother moved to Ohio but physical custody was changed to Father, or (3) Mother remained in California because the court refused to permit the children to move.

Following the August 23, 2001 hearing on Mother's motion, the court first found that Mother had legitimate reasons for wishing to relocate, so her request was not made in "bad faith," i.e., as an attempt to relocate the children specifically to limit their contact with Father. Nevertheless, it denied her motion because the "primary importance" at present was to reinforce the "tenuous and somewhat detached" relationship between Father and the children; disrupting the process presently underway with Dr. Barry Tuggle, a psychologist counseling Father and the children, would be extremely detrimental; there were realistic concerns that the Father/child relationship would be lost if the children moved; and moving 2,000 miles away would be detrimental to their welfare because the move would not promote their frequent and continuing contact with Father. It ordered physical custody to Father for the school year if Mother elected to move, and ordered the present custody/visitation schedule continued if she remained in California.

Mother appeals the minute order.

DISCUSSION

I

Father contends the appeal is premature because it is from a minute order.

California Rules of Court, rule 2(c)(2) states: "The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But

if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under rule 391 [governing preparation of orders] or similar local rule is not such an order prepared by direction of a minute order."

Father acknowledges the August 23, 2001 minute order from which Mother appeals does not direct the preparation of a written order, but he argues the court's comments at the end of the August 23 hearing contemplated a written order. The court and parties had selected September 7 as the date for further hearing on the determination of primary physical custody based on Mother's decision during the interim about moving to Ohio. The court concluded the August 23 proceeding by saying, "All right. When you return here on September 7th, I assume that some elections will have been made and we can talk about finalizing the terminology of the order."

The court's remarks may anticipate an eventual written order addressing the children's custody depending on Mother's choice of residence. However, the decision on Mother's motion became final when it was denied by the court on August 23, and the minute order reflecting that decision contains no express requirement for a written order. Consequently, Mother's August 24 notice of appeal is timely. (See *In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406, 1410-1411.)

II

Mother contends the court erred in denying her, as the custodial parent, the "presumptive right" to move to Ohio with the children.

a. Nature of August 23 Order

As a preliminary matter, we note that although the August 23 proceeding was initiated by Mother's order to show cause for modification of visitation and "move-away order," it was in substance a hearing to determine whether to transfer physical custody to Father if Mother relocated to Ohio. As discussed, *post*, Mother, as custodial parent, was presumptively entitled to move with the children, so she did not need to obtain an order allowing her to do so. She would need to obtain only a modification of the existing visitation order because the distance of the move would presumably preclude adherence to it. The nature of Father's opposition to her order to show cause effectively

transformed the matter into a custody modification hearing. Once Mother established a sound good faith reason to move, the question for the trial court was not whether Mother would be permitted to move to Ohio, but what custody arrangements should be made as a consequence. (See *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1203, 1206.) We therefore construe the court's ruling as, in fact, a change of custody order and review it accordingly.

b. Change of Custody Generally

A parent with physical custody of the children has the presumptive right to change the children's residence, subject to the court's power to restrain a move that would prejudice the children's welfare. (Fam. Code, § 7501;[2] *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) The noncustodial parent seeking a modification of custody after a judicial custody determination has the burden of showing that the relocation will result in a substantial change of circumstances so affecting the minor child that modification of custody is essential for the child's welfare. (*Id*. at pp. 37-38; *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 141 (*Whealon*).)

"'Once it has been established [under a judicial custody decision] that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. [Citation.] [¶] The showing required is substantial. . . . In a 'move-away' case, a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it '"essential or expedient for the welfare of the child that there be a change."' [Citation.]" (*Burgess, supra*, 13 Cal.4th at p. 37.)

The noncustodial parent's burden is consistent with the custodial parent's statutory presumptive right to change the child's residence unless doing so would prejudice the child's rights or welfare, and it recognizes the reality of "an increasingly mobile society."

[2] All further section references are to the Family Code.

(*Whealon*, *supra*, 53 Cal.App.4th at p. 141; § 7501; see also *Burgess*, *supra*, 13 Cal.4th at p. 38.) The dispositive issue is not whether relocating, by itself, is essential or expedient for the child's welfare but "whether *a change in custody* is '"essential or expedient for the welfare of the child"' [citation]" when the custodial parent seeks to relocate with the child. (*Burgess*, *supra*, at p. 38, italics in original.)

Custody and visitation orders are reviewed under the deferential abuse of discretion test (*Burgess, supra,* 13 Cal.4th at p. 32), although appellate courts are "less reluctant to find an abuse of discretion" when a trial court orders a change in an existing custodial arrangement. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 731.) "The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*Burgess, supra*, at p. 32.) We conclude that, although the court referred several times during the hearing to "best interest" as the applicable standard, its order was not truly based on that criterion as it applies in the context of this custodial parent's relocation.

c. Father's Pending Motion to Modify Custody

Father urges that the *Burgess* presumption should not apply in light of the fact his "motion to modify custody" was pending prior to Mother's petition to modify visitation and move to Ohio.

As noted, *supra*, after Father sought a modification in November 1998 to expand his visitation, the parties stipulated in April 1999 to an updated evaluation by Dr. Stahl to recommend whether any change in the parties' "custody timeshare" was appropriate. On February 13, 2001, two weeks before Dr. Stahl submitted his evaluation, Mother filed her motion for a modification of visitation based on her proposed move to Ohio. Father speculates that Mother's motion may have been timed "to do an end run around" Dr. Stahl's possible recommendations concerning visitation and custody in his anticipated evaluation. In fact, Dr. Stahl's February 26, 2001 evaluation did recommend that the children have expanded visitation with Father, and suggested that "it might be appropriate" to have either a true joint custody or primary custody with Father if Mother continued her negative and devisive attitude toward him.

Apparently due to Mother's intervening February 2001 motion to modify visitation, the court never ruled definitively on Father's November 1998 motion. Instead it issued an interim order in March 2001 that expanded visitation for the remainder of the school year and an order in May 2001 that expanded the 2001 summer vacation visitation, both pursuant to Dr. Stahl's February 2001 recommendations. These two orders were made in anticipation of the "focused" evaluation to address the relocation of the children to Ohio that the court ordered Dr. Stahl to make in light of Mother's February motion.

Father argues that Mother's February 2001 "motion to relocate" cannot be used to "trump" his pending, i.e., November 1998 request to increase his time with his children. To the extent Father is arguing that the *Burgess* analysis should not apply because his motion was filed first, we disagree. First, Father's November 1998 motion was not to change physical custody to him but to expand the children's visitation with him. Any issue about the appropriate length and frequency of visitation can be addressed just as readily in Mother's motion to modify visitation. (See *Burgess, supra*, 13 Cal.4th at p. 36; *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 793.)

Second, the timing of Mother's motion certainly could have been argued in opposition to her motion, as a factor for the court to consider in its "bad faith" analysis of her proposed move, i.e., was her reason for moving to frustrate Father's relationship with the children? (*Bryant, supra*, 91 Cal.App.4th at p. 794.) Insofar as the court concluded that Mother's proposed move to Ohio was not made in bad faith, it implicitly found that the timing of her motion did not imply bad faith.

Third, to adopt Father's argument would effectively reward the winner of the race to the courthouse. To do so in the context of proceedings concerning custody and visitation is contrary to the overriding and fundamental public policy that any decision concerning a parenting plan must be grounded in the best interest of the child. (§ 3020, subd. (a).)

d. Mother's Presumptive Right

Burgess emphasized that "the paramount need for continuity and stability in custody arrangements--and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker--weigh heavily in favor of maintaining ongoing custody arrangements. [Citations.]" (*Burgess, supra*, 13 Cal.4th at pp. 32-33.) Here, the court neither proceeded from the presumption that Mother had a right to change the residence of the children, nor took into account this paramount need for stability and continuity in the existing custodial arrangement. Instead, it placed undue emphasis on the detriment that would be caused to the children's relationship with Father if they moved.

The court prefaced its ruling by stating that, although it found no conscious effort on the part of one parent to interfere or cut off the children's relationship with the other parent, there was a demonstrated pattern by the parties since their separation of responding to the children in a manner that aligned them with one parent and resulted in a strained or hostile relationship with the other parent. It attributed this pattern to the parties' inability to let go of their anger toward each other. The court's comments were implicitly directed to Mother, given Dr. Stahl's opinion that Mother tended to reinforce the children's negative comments about Father, but Father did not do the same about Mother. The court then noted: "Clearly if the parties had been co-parenting with the children and cooperative in this matter, under those circumstances there might well be a presumptive right" for Mother to relocate with the children.

The court's function in determining custody is "'not to reward or punish the prior behavior of any party, but to judge each party's current ability to provide care for the children.'" (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 553; see also *In re Marriage of Hopson* (1980) 110 Cal.App.3d 884, 907.) The court's remarks imply that Mother was losing her presumptive right to move with the children as punishment for her inability or unwillingness to refrain from masking her discord with Father in front of the children. Although such conduct may be less than estimable, it does not ipso facto deprive her of her presumptive right to move with the children. The right is defeated

only by a "substantial" showing that the move will cause such detriment to the child that a change in custody is essential for the child's welfare. (*Burgess*, *supra*, 13 Cal.4th at p. 38.) As the trial court itself observed, the kind of behavior the parties had exhibited is all too common between divorced parents, who are often angry and bitter toward each other. A history of disharmony and lack of cooperation between the parents does not permit the court to put aside the custodial parent's presumptive right to move as punishment for such behavior, as this court appeared to do.

e. Disruption to Existing Custody Arrangement

The balance of the court's ruling nowhere refers to the disruption that would be caused to the stability and continuity of the children's existing environment by transferring custody from Mother to Father. After observing that Mother was presently "incapable of promoting" the relationship between the children and Father because she did not "believe it is in the children's best interest," the court's focus was only on the effect of a move on the relationship between the children and Father. "The primary importance, it seems to me at this point, is to be able to reinforce what is now a tenuous and somewhat detached relationship with the [children and Father]. That there is a process with Dr. Tuggle [therapist for children and Father] which is in fact promoting that relationship. That disrupting that would be extremely detrimental. [¶] I think the concerns about the relationship being lost if the children are relocated at this time are realistic. Certainly I would find that the preponderance of the evidence would indicate that would be the likely result at this time of a relocation. [¶] Therefore, I think that a relocation of the children. . . the distance of 2000 miles . . . would inevitably under these circumstances be detrimental to their welfare. It would not promote frequent and continuing contact with [Father] . . ."

The court's remarks do not reflect a true "best interest" of the child custody evaluation because they do not give any weight to the presumption favoring continuation of the existing custodial arrangement so that the stability and continuity of the child's environment is not disrupted. (*Burgess*, *supra*, 13 Cal.4th at pp. 32-33.) By concentrating only on the effect of the move on the Father/child relationship, it overlooks the severe

disruption to the children's lives that would ensue if they were separated from Mother, the parent who has been their primary caretaker all their lives. (*Ibid*.) There is inevitably a significant detriment to the relationship between the child and the noncustodial parent when the custodial parent makes a good faith decision to move away. (*In re Marriage of Edlund & Hales* (1998) 66 Cal.App.4th 1454, 1472.) However, if evidence of some detriment due to geographical separation were to mandate a change of custody, the primary custodial parent would never be able to relocate. (*Ibid*.)

Furthermore, to the extent the court based its decision on the statutory policy encouraging a child's "frequent and continuing contact" with both parents after a dissolution (§ 3020, subd. (b)), its interpretation was overly narrow. This policy must be considered in conjunction with other policies pertinent to custody, including the policies of allowing the custodial parent the freedom to move and the child's need for continuous, stable custody arrangements. The fact that a move by the custodial parent may have an adverse effect on the frequency of contact between the child and the noncustodial parent is not determinative; what is determinative is the best interest of the child when one parent is moving and the other is not. (*In re Marriage of Bryant, supra,* 91 Cal.App.4th at p. 794.) Should the policy of frequent and continuing contact conflict with the policy that the court's primary concern when determining the best interest of the child is assuring the child's health, safety and welfare, the conflict may be satisfied by an order for liberal visitation with the noncustodial parent. (§ 3020, subd. (c); see *Burgess, supra*, 13 Cal.4th at p. 36.)

f. Failure to Meet Burden

Finally, when the record as a whole is viewed from the perspective of Mother's presumptive right to move, Father's evidence does not satisfy his "substantial" burden of showing that the detriment the children will suffer from the move, i.e., the disruption and possible loss of the Father/child relationship due to the inability to have frequent and continuing contact, makes a change in custody essential for their welfare. (*Burgess*, *supra*, 13 Cal.4th at p. 38.)

The primary source of the court's order was the report and testimony of Dr. Stahl. Yet Dr. Stahl was neither asked nor volunteered whether it was essential for the children's welfare to transfer custody to Father if Mother moved to Ohio. Nor, insofar as he did not have a definitive answer as to whether the children would suffer detriment if they moved to Ohio, can his opinion on the question be inferred.

On one hand, Dr. Stahl recognized a risk that if the children were absent from Father, their currently improving relationship with him could regress to a more detached and disconnected state. He opined that if the relationship regressed, the children's adjustment to their new circumstances in Ohio would not be "complete," even if they adjusted "well on the surface."

On the other hand, Dr. Stahl reported that the children wanted to move to Ohio, so in the short term it was possible they would feel closer to Father because they would not see him so often and would feel good that they were able to move. As he elaborated at the hearing, if the children perceived that Father approved of this move they wanted to occur, they could view him as an "okay dad." Conversely, according to Dr. Stahl, if they were precluded by court order from moving, they would likely feel their wishes were not being heard, which would increase their anger and frustration and potentially increase their rejection of Father because they would blame him that they were unable to move. Dr. Stahl opined that "[t]he major risk of keeping [the children in California] is that [they] will increase their rejection of [Father], blaming him for the disruption of their family with [Mother]. If that occurs, they will potentially make everyone's life miserable, and they could regress in their functioning with school and peers. On the other hand, they might also resign themselves to the fact that they are here with [Father], and with ongoing therapy, they could settle into a healthy routine. Unfortunately, there's no way to predict which way the [children] might adjust." Father, according to Dr. Stahl, understood the children wanted to move to Ohio, and acknowledged that if they were forced by court order to stay in California, they could become "totally alienated" from him.

Dr. Stahl also reported that although the children "might" not maintain any positive relationship with Father if they moved, that loss, although significant, had to be balanced against the significant loss they would suffer if Mother moved without them, as well as the loss of their stepfather and half-sister to whom they were close. He further reported that there was no evidence of detriment to the children if they moved with Mother other than the potential detriment of regression of their relationship with Father. He noted that he first recommended against Mother's moving away, when they were two and four years old, because their relationship with Father was not yet stable. He then noted that because they were now older, they were likely to be able to "'hold onto'" their relationship with him, even with a move.

Dr. Stahl was concerned whether Mother, once in Ohio, would act in a manner that fostered and facilitated a healthy relationship between Father and the children, given her inconsistent history of doing so and her history of negativity toward Father. However, he had no reason to believe that she would refuse to comply with any court-ordered visitation orders. He also observed that if Mother were in Ohio with the children where she wanted to be, she might be less negative toward Father and find it easier to promote his relationship with the children.

Dr. Stahl's evidence can fairly support a finding that moving to Ohio *could* result in some detriment to the children: a possible deterioration of their fragile but improving relationship with Father. By its own ambivalence and speculation, though, his evidence cannot support a finding that this detriment rises to the level of rendering a change of custody essential for the children's welfare, and thus overcoming the presumptive right of Mother to move. (*Burgess, supra*, 13 Cal.4th at p. 38.) Not only did Father acknowledge to Dr. Stahl that his relationship with the children could deteriorate if they were not permitted to move, but Dr. Stahl acknowledged that the Father/child relationship might even improve if the children moved to Ohio, and he recognized that the children would equally suffer detriment if they were not permitted to move, in the form of the "significant" loss of Mother. Given the paramount importance of maintaining a stable and continuous custodial arrangement, the detriment to the children of losing their

primary caregiver and their established pattern of care and emotional bonds with her outweighs the detriment of possibly jeopardizing a relationship with the noncustodial parent.

III

Mother contends the trial court erred in conditioning the change of custody to Father as a device to restrain her from moving. We agree. Such a conditional order can be construed as calling the relocating parent's bluff--she will not move if it doing so would result in a loss of custody--when there is no statutory basis for permitting the trial court to test parental attachment or risk detriment to the best interest of the child on those grounds. (*Burgess, supra*, 13 Cal.4th at p. 36, fn. 7.)

As *Bryant, supra*, 91 Cal.App.4th at pages 795-796 observed about the custodial mother's move from Santa Barbara to New Mexico, in a perfect world it would be in the best interests of the children if she remained in Santa Barbara where the noncustodial father lived. However, *Bryant* also observed, to accomplish such an arrangement through coercion by conditionally granting physical custody to the father if the mother moved away is contrary to *Burgess*. (*Bryant*, *supra*, at p. 796.) As long as the custodial parent has a good faith reason to move, and the noncustodial parent has not made a substantial showing that, as a result of the move, the child will suffer detriment making a change of custody essential for the child's custody, the custodial parent cannot be prevented, directly or indirectly, from exercising his or her right to change the child's residence.

DISPOSITION

We reverse the order to the extent it grants primary physical custody of the children to Father if Mother moves away. We remand with directions to determine whether, in light of Mother's presumptive right to move with the children, a change of custody is essential for the children's welfare. (§ 7501; *Burgess, supra*, 13 Cal.4th at p. 32.) In so doing the trial court may consider additional circumstances bearing on the children's best interest that may have developed since the date of the order appealed from. (*In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 764.)

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Jones, P.J.

We concur:

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Simons, J.

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Gemello, J.